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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2014-128973-001 DT 05/03/2016

HONORABLE PETER C. REINSTEIN

CLERK OF THE COURT
A. Schmidt
Deputy

STATE OF ARIZONA

PATRICIA L STEVENS
DAVID JEREMY BODNEY
HEATHER HORROCKS

v.

GARY MICHAEL MORAN (001)

BOBBI FALDUTO
ANGELA L WALKER

CAPITAL CASE MANAGER

RULING

The Court has considered the defendant's Motion and Declaration Requesting Out-of-State Subpoena Duces Tecum and Proposed Certificate of Requesting Judge, the Response in Opposition to Motion Requesting Out-of-State Subpoena Duces Tecum filed by LSB Broadcasting, Inc. (dba KYTX CBS 19 News) ("KYTX"), and the defendant's reply. The Court does not need oral argument to decide this issue.

The defendant is charged, inter alia, with the first-degree murder of Father Kenneth Walker and the aggravated assault of Father Joseph Terra. The State has noticed its intention to seek the death penalty if the defendant is convicted of first-degree murder. The perpetrator and Fr. Terra are the sole witnesses to the events.

On February 4, 2016, KYTX aired a story by reporter Michael Aaron titled "Following brutal attack, priest continues healing in East Texas." The story included video footage of an interview Mr. Aaron conducted with Fr. Terra about the crime, the nature and lasting effects of his injuries, and his feelings of forgiveness of the defendant.

Pursuant to A.R.S. §13-4093, the defendant requests that this Court to issue a certificate to be presented to a judge of the County Criminal Court of Smith County, Texas requiring

KYTX to produce "all documentation of Father Joseph Terra's statements, including audio recordings, video recordings, and handwritten notes of Fr. Terra's statements regarding the facts underlying the above criminal case against Mr. Gary Moran." (Certificate at ¶X).[1] Both Arizona and Texas have adopted the Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings ("Uniform Act"). *See* Statutory Note preceding A.R.S. §13-4091 *et seq.*

The Uniform Act applies to the production of documents through a subpoena duces tecum. *Johnson v. O'Connor ex. rel. County of Maricopa,* 235 Ariz. 85, ¶21, 327 P.3d 218 (App. 2014). In *Johnson*, the Court of Appeals held that "[w]hether evidence sought under the Uniform Act is privileged or protected from disclosure is a determination for the state court requesting the summons, not for the state court issuing the summons." *Id*. at ¶2. Because Arizona is the state court requesting the summons, this Court determines whether the requested materials are privileged or protected from disclosure.

KYTX opposes the certificate on the grounds that (1) defense counsel's affidavit fails to comply with the requirements set forth in A.R.S. §12-2214 ("Media Subpoena Law") rendering the subpoena of no effect; (2) the information sought also is protected by the journalist's privilege under the First Amendment; and (3) the request is defective because it will not be issued in the county in which KYTX resides.[2]

Media Subpoena Law

A.R.S. §12-2214 provides in relevant part:

> A. A subpoena for the attendance of a witness or for production of documentary evidence issued in a civil or criminal proceeding and directed to a person engaged in gathering, reporting, writing, editing, publishing or broadcasting news to the public, and which relates to matters within these news

[1] The certificate attached to Defendant's motion was addressed to the court in Dallas County, Texas. In its response, KYTX noted that Dallas County was the incorrect county because it was located in Smith County. In his reply, Defendant explained that before filing his motion and the certificate, he was advised by a Texas attorney representing KYTX that the correct county was Dallas County. Upon receiving KYTX's response, he corresponded with local counsel, Mr. Bodney and Ms. Horrocks, and was advised that the correct county was Smith County. Based on these circumstances, the Court accepts the certificate attached as Attachment C to the defendant's reply to be the one at issue here.

[2] The Court finds this argument to be moot, as explained in Footnote 1, *supra*.

activities, shall have attached to it an affidavit of a person with a direct interest in the matters sought which states all of the following:

1. Each item of documentary and evidentiary information sought from the person subpoenaed.

2. That the affiant or his representative has attempted to obtain each item of information from all other available sources, specifying which items the affiant has been unable to obtain.

3. The identity of the other sources from which the affiant or his representative has attempted to obtain the information.

4. That the information sought is relevant and material to the affiant's cause of action or defense.

5. That the information sought is not protected by any lawful privilege.

6. That the subpoena is not intended to interfere with the gathering, writing, editing, publishing, broadcasting and disseminating of news to the public as protected by the first amendment, Constitution of the United States, or by article II, section 6, Constitution of Arizona.

B. A subpoena served on a person described in subsection A without the required affidavit attached to it has no effect.

In *Bartlett v. Superior Court,* 150 Ariz. 178, 722 P.2d 346 (App. 1986), review denied, the Court of Appeals determined the validity and applicability of A.R.S. §12-2214. In that case, a civil litigant subpoenaed a videotape produced by a local television station. The TV station controverted the affidavit attached to the subpoena and also asserted that it failed to meet the statutory requirements. The Court of Appeals first determined the procedure to follow when the subpoenaed party objects to the subpoena:

> Clearly, the initial burden rests with the party seeking the information to demonstrate compliance with the requirements of A.R.S. §12–2214(A)(1) through (6). For the reasons stated above we do not believe, however, that a showing of compelling need or that the party cannot make his case without the information is required. The party must identify in reasonable detail in his affidavit the information sought, the efforts made to obtain it and from what sources. A.R.S. §12–2214(A)(1) through (3). The provisions of subsections (A)(4) through (6) would appear to require no more than the affiant's avowal, unless controverted.
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> Once the party seeking the information has complied with the requirements of subsection (A), the burden shifts to the party opposing the subpoena to controvert the allegations of the affidavit and to set forth the bases therefor. It is not sufficient, for example, merely to allege that the same information can be obtained elsewhere; rather the affidavit must set forth the

> manner in which previous efforts were deficient or other specific sources from which the information is available. Nor do we believe that the statute requires the presentation to and review by the court of every other source investigated. To hold otherwise would place a heavy and unwarranted burden on both the party seeking the information and the court.
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> 150 Ariz. at 183, 722 P.2d at 341.

KYTX argues that defense counsel Angela Walker's affidavit does not meet the requirements of A.R.S. §12-2214(A)(1) through (6) because it fails to (1) avow that the affiant has attempted to obtain the information from all other available sources and has been unable to obtain them (A.R.S. §12-2214(A)(2)); (2) demonstrate that the information is relevant and material to the defendant's defense (A.R.S. §12-2214(A)(4)); and (3) establish that the information is not protected by any legal privilege (A.R.S. §12-2214(A)(5)).

Ms. Walker's affidavit states that she has been unable to obtain the requested materials from any other source and that Mr. Aaron is the only person in possession of these materials. *See* Affidavit of Angela Walker, ¶¶15-16. These averments sufficiently convey that the defendant has attempted to obtain the requested information from all other available sources. The Court finds that the affidavit complies with A.R.S. §12-2214(A)(1) through (3).

Regarding the requirements of A.R.S. §12-2214(A)(4) through (6), Ms. Walker averred that the "[t]he information given by both Fr. Terra and Mr. Aaron is relevant and material to Mr. Moran's defense because Fr. Terra is the only living witness to the alleged crimes other than Mr. Moran. Such information is also relevant and material because Fr. Terra has made inconsistent statements about the above facts in various police and media interviews since the crimes." Affidavit of Angela Walker, ¶9. She further stated that the information sought was not protected by any lawful privilege, and the subpoena was not intended to interfere with constitutionally protected newsgathering. *Id*. at ¶¶17-18.

As *Bartlett* notes, "[t]he provisions of subsections (A)(4) through (6) would appear to require no more than the affiant's avowal, unless controverted." 150 Ariz. at 183, 722 P.2d at 341. KYTX has submitted Mr. Aaron's controverting affidavit, in which he states that the unaired video footage sought by the defendant "reflects information provided to me directly by Father Terra. To the extent that Defendant wants to access that information, he can do [sic] obtain it by asking Father Terra (1) what he told me, (2) whether the Report accurately reflects my interview with him, or (3) related questions." This statement, which is not fact but argument, that Fr. Terra is another available source because he can tell the defendant what he said to Mr. Aaron, misses the point. Fr. Terra's recollection about what he said to Mr. Aaron may differ from recording of the interview; the defendant can determine this only by obtaining the unaired

video footage. Given this and based on Ms. Walker's avowals, the Court finds that the affidavit also complies with A.R.S. §12-2214(A)(4) through (6), and KYTX has failed in its burden to controvert the allegations made in Ms. Walker's affidavit.

First Amendment "Qualified Reporter's Privilege"

KYTX also argues that independently of any statutory shield law, "[u]nder well-settled First Amendment law, KYTX enjoys a constitutional privilege against compelled disclosure of unpublished journalistic information…." (Opposition at 7).

In *Bartlett* and again in *Matera v. Superior Court*, 170 Ariz. 446, 449-50, 825 P.2d 971, 974-75 (App. 1992), review denied, the Court of Appeals addressed this constitutional privilege and held that it is codified as A.R.S. §12-2237.[3] *See Matera*, 170 Ariz. at 449, 825 P.2d at 974 ("The constitutional privilege afforded to reporters in Arizona is codified at A.R.S. § 12–2237."). The *Matera* court held that the statute protects reporters only from being compelled to reveal confidential sources:

> As is apparent from the language of §12–2237, the statute protects members of the media from being compelled to testify about or otherwise disclose confidential sources utilized during the newsgathering process. The statute does not protect all the activities of would-be publishers or newsgatherers, nor does it protect any and all information gathered.

Matera, 170 Ariz. at 449-50, 825 P.2d at 974-75.

The Court refused Matera's request to expand the privilege to protect nonconfidential sources and information, as various federal courts had done. It noted its agreement with the assessment of the statute's privilege made in *Bartlett*:

> Petitioners argue that *Branzburg* [*v. Hayes*, 408 U.S. 665 (1972)] and its progeny confer on members of the news media a qualified constitutional privilege

[3] A.R.S. §12-2237 provides: "A person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio or television station, shall not be compelled to testify or disclose in a legal proceeding or trial or any proceeding whatever, or before any jury, inquisitorial body or commission, or before a committee of the legislature, or elsewhere, the source of information procured or obtained by him for publication in a newspaper or for broadcasting over a radio or television station with which he was associated or by which he is employed."

> against providing information in civil litigation unless the party seeking the information demonstrates a compelling need for information which goes to the heart of the litigant's claim or defense and which is possessed only by members of the media. While it is true that the cases cited by petitioners have indeed found such a privilege, that finding was in each case premised on the existence of a factor which we believe was critical to the *Branzburg* court and which is decidedly absent here. As the Court succinctly stated: "The heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information." 408 U.S. at 682, 92 S.Ct. at 2656, 33 L.Ed.2d at 639. Thus the claim of privilege depends, in the first instance, upon the existence of a confidential relationship such that compliance with a subpoena would either result in disclosure of confidential information or sources or would seriously interfere with the news gathering and editorial process.
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> *Bartlett*, 150 Ariz. at 182, 722 P.2d at 351; *Matera*, 170 Ariz. at 450, 825 P.2d at 975.

See also, *State v. Moody*, 208 Ariz. 424, ¶139, 94 P.3d 1119, 1153 (2004) ("In Arizona, a reporter has a privilege to shield a confidential source for an article. *See* A.R.S. §12–2237 (2003). We agree with *Moody* that the reporter's privilege is not implicated in this case because [the reporter's] article did not involve a confidential source.").

Here, KYTX does not claim that the defendant's subpoena would compel Mr. Aaron to reveal a confidential source or information or would impede the gathering of information. Because the privilege applies only to confidential sources and KYTX makes no claim respecting confidential sources, the Court finds that KYTX also is not protected by any qualified privilege under the First Amendment.

Nonetheless, assuming *arguendo* that the First Amendment provides more protection to KYTX than A.R.S. §12-2237, the Court finds that the defendant has met his burden to defeat this privilege. KYTX relies on the test set forth by the Ninth Circuit Court of Appeals in *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995)("*Shoen II*"), as determinative whether the party seeking the information can overcome the journalist's privilege under the First Amendment and compel disclosure. That test requires the defendant to show that the information sought from KYTX is "(1) unavailable despite exhaustion of all…alternative sources, (2) noncumulative, and (3) clearly relevant to an important issue in the case." *Id*. at 416.

KYTX argues that the defendant has not demonstrated that he has exhausted all alternative sources because he has failed to request the information from Fr. Terra. As previously noted, this argument misunderstands a criminal defendant's Fifth and Sixth Amendment rights to

present a defense and confront witnesses. Fr. Terra is the sole percipient witness of the crimes (other than the perpetrator). His testimony will not only be relevant in the guilt phase of this capital trial, but also likely regarding the alleged aggravators and possibly to rebut mitigation. Whether he has recited the facts consistently or differently to each individual who has interviewed him, whether police officers, investigators, or reporters, forms an important part of the defendant's right to cross-examine him when he testifies at trial. Even if Fr. Terra agreed to be interviewed by the defense, his recollection of events again may differ from what he told Mr. Aaron. KYTX's argument that the defendant's failure to disclose whether or not Fr. Terra has refused a defense interview, as is his right as a victim in this case, is not persuasive for this very reason. The defendant cannot obtain the same information from Fr. Terra; Fr. Terra's recollection of what he told Mr. Aaron may differ from what was recorded during the interview.

Pursuant to the *Schoen II* test, the Court finds that the defendant's constitutional rights overcome KYTX's constitutional privilege.

For all of these reasons, the Court finds that the defendant has shown that the information is unavailable from any other source, clearly relevant to his ability to effectively cross-examine Fr. Terra, and is noncumulative. The materials requested by the certificate are not protected by any qualified privilege under the First Amendment.

Therefore,

IT IS ORDERED granting the Motion and Declaration Requesting Out-of-State Subpoena Duces Tecum.

IT IS FURTHER ORDERED granting the defendant's request for issuance of his Proposed Certificate of Requesting Judge (Attachment C to Defendant's reply), all in accordance with the formal written Certificate of Requesting Court for Production of Documents. The Defendant shall submit an updated certificate to the Court within one week of the receipt of this minute entry.